CHAPTER 6

TRIAL COURTS

ARTICLE 3

NEBRASKA COURT RULES OF DISCOVERY IN CIVIL CASES

(**Revisor's note**: The former Nebraska Discovery Rules for All Civil Cases have been renumbered in the revised Nebraska Court Rules as Chapter 6, Article 3, Nebraska Court Rules of Discovery in Civil Cases. Thus, former rule 26 is now Neb. Ct. R. Disc. § 6-326, etc., with the last two numbers of the newly renumbered sections corresponding to the former rule number. Subsections and references within the rule to rules by number and subsection remain unchanged. Thus, a reference in this rule to rule 34(b) should be interpreted and found at Neb. Ct. R. Disc. § 6-334(b), etc.)

§ 6-301. Promulgating order.

Pursuant to the provisions of Neb. Rev. Stat. § 25-1273.01, the Supreme Court does hereby promulgate the following discovery rules in civil cases, effective as of January 1, 1983.

These rules shall, as written, apply in the district courts, and in all other courts of Nebraska to the extent not inconsistent with other statutes. Rules 26 and 37 are applicable to county courts as to actions pending in those courts on the effective date of these rules.

COMMENT ON CIVIL DISCOVERY RULES

These discovery rules follow the structure of the current discovery portion of the Federal Rules of Civil Procedure, but the content of the Nebraska rules is not always that of the federal rules. The federal rules were used for the structure because they are well known, being used in federal court and in many state courts, and because Nebraska originally followed the federal pattern when discovery was adopted in Nebraska in 1951. The committee considered the text of current Nebraska statutes, the current federal rules, recently

proposed federal rules, and certain rules used in other states, and recommended the language that appears best for Nebraska practice. The federal rule numbers were retained for ease of comparison with the law of other jurisdictions.

(The preceding comment and comments following each rule were adopted from the comments of the Supreme Court Committee on Practice and Procedure submitted to the Supreme Court in October 1981.)

§§ 6-302 to 6-325. Reserved.

§ 6-326. General provisions governing discovery.

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a

written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the district court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to

(A) the identity and location of persons having knowledge of discoverable matters, and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

(2) A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which

(A) he or she knows that the response was incorrect when made, or

(B) he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court or by agreement of the parties.

(f) Service of Discovery Papers. Except as otherwise ordered by the court, every discovery paper and every motion relating to discovery and response thereto required to be served upon a party shall be served upon each of the parties not in default for failure to appear.

(g) Filing of Discovery Materials. Discovery materials that do not require action by the court shall not be filed with the court. All such materials, including notices of deposition, depositions, certificates of filing a deposition, interrogatories, answers and objections to interrogatories, requests for documents or to permit entry upon land and responses or objections to such requests, requests for admissions and responses or objections to such requests, subpoenas for depositions or other discovery and returns of service of subpoenas, and related notices shall be maintained by the parties.

Discovery materials shall be filed with the court only when ordered by the court or when required by law. If the original of a deposition is not in the possession of a party who intends to offer it in evidence at a hearing, that party may give notice to the party in possession of it that the deposition will be needed at the hearing. Upon receiving such notice the party in possession of the deposition shall either make it available to the party who intends to offer it or produce it at the hearing.

COMMENTS TO RULE 26

26(a) This subsection provides a catalog of the discovery devices, and is new to Nebraska law. Although there is no limit on the frequency of use of these methods, the limit on interrogatory questions in Rule 33 will restrict the extent of discovery by interrogatory.

26(b)(1) and (2) The definition of the scope of discovery in subsection (1) follows former Neb. Rev. Stat. § 25-1267.02 (Repealed 1982). The provision of subsection (2) was taken from the federal rules and follows the rule established in *Walls v. Horback*, 189 Neb. 479, 203 N.W.2d 490 (1973).

26(b)(3) Subsection (3) provides for protection of material often described as an attorney's work product, and follows the language of the federal rule. Prior Nebraska law on discovery of work product was established in *Haarhues v. Gordon*, 180 Neb. 189, 141 N.W.2d 856 (1966). A provision similar but not identical to the second paragraph of subsection (3) was found in Neb. Rev. Stat. § 25-1222.02 (Repealed 1982). That section, however, applied only to statements by parties and provided only the sanction of exclusion at trial. The language found in subsection (3) was adopted to maintain uniformity of language, to authorize a wider range of sanctions, and to cover statements by parties and nonparties.

26(b)(4) Subsection (4) on experts presents in the expanded language of the federal rules the idea found in former Neb. Rev. Stat. § 27-705(2) (Repealed 1982). The committee recommended repeal of that section, a part of the Nebraska Evidence Rules, because it is a discovery procedure better codified here in the discovery rules.

26(c) This provision on sanctions is substantially similar to former Neb. Rev. Stat. §§ 25-1267.22 and 25-267.31 (Repealed 1982), but is expanded to include all kinds of discovery and not just depositions and interrogatories.

26(d) This is a new provision identical to the federal rules; it would not appear to change current Nebraska practice.

26(e) This provision on supplementation of discovery was added to the federal rules in 1970 and is now adopted for the first time in Nebraska. The proposed language follows the federal rule, except that in subsection (e)(3) the federal language allowing imposition of the duty to supplement by a request for supplementation was rejected.

26(f) A provision on service of discovery papers is necessary because Nebraska law prior to the adoption of these rules did not cover the topic. This is a nonuniform addition to the language of the federal rules because such a provision is in Rule 5(a) of the federal rules, while Nebraska has no similar rule.

26(g) This rule has been adopted because the routine filing of discovery material has unnecessarily overcrowded court files. Parties are now required to keep possession of the discovery material and file it only upon court order or when required by law. Discovery materials used to support or resist a motion for summary judgment shall not be filed separately; § 25-1332 (Amended 2001) makes clear that the court may consider them only if they are admitted as evidence.

Rule 26(g) amended December 12, 2001l Comments to Rule 26(g) amended December 12, 2001, Renumbered and codified as § 6-326, effective July 18, 2008.

§ 6-327. Depositions before action or pending appeal.

(a) Before Action.

(1) Petition. A person who desires to perpetuate his or her own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a petition verified by affidavit of the petitioner or his or her attorney in the district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show:

(i) The petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought;

(ii) the subject matter of the expected action and his or her interest therein;

(iii) the facts which he or she desires to establish by the proposed testimony and his or her reasons for desiring to perpetuate it;

(iv) the names or a description of the persons he or she expects will be adverse parties and their addresses so far as known; and

(v) the names and addresses of the persons to be examined and the substance of the testimony which he or she expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the manner provided for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court shall order service by publication in the manner provided in Rule 30(b)(1)(B), and shall appoint, for persons not served in the manner provided for service of summons, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Neb. Rev. Stat. § 25-309 shall apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a district court in this state, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court, the appellate court, upon motion filed therein and notice and service thereof as if the action was pending in the district court, may remand the motion to the district court for consideration and ruling, may itself overrule the motion, or, if the appellate court finds that the perpetuation of the testimony is proper to avoid failure or delay of justice, may itself enter an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court. The motion shall show

(1) the names and addresses of persons to be examined and the substance of the testimony which he or she expects to elicit from each;

(2) the reasons for perpetuating their testimony.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

COMMENT TO RULE 27

The language of Rule 27 is substantially similar to federal rule 27 and to former Neb. Rev. Stat. §§ 25-1267.08 to 25-1267.13 (Repealed 1982).

Rule 27(b) amended January 14, 1998. Renumbered and codified as § 6-327, effective July 18, 2008.

§ 6-328. Persons before whom depositions may be taken.

(a) Within this State. Within this State depositions may be taken before a judge or clerk of the Supreme Court or district court, a county judge, clerk magistrate, notary public, or any person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) Elsewhere Within the United States. Within other states of the United States or within a territory or insular possession subject to the jurisdiction of the United States depositions may be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(c) In Foreign Countries. In a foreign country, depositions may be taken

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his or her commission to administer any necessary oath and take testimony, or

(3) pursuant to a letter rogatory.

A commission or a letter rogatory shall be issued on application and notice on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(d) Disqualification for Interest. The officer before whom the deposition is taken and the person recording the testimony shall not be a relative, employee, or attorney of any of the parties, nor a relative or employee of such attorney, nor financially interested in the action.

(e) Depositions for Use in Foreign Jurisdictions. When the deposition of any person is to be taken in this state pursuant to the laws of another state or of the United States or of another country for use in proceedings there, witnesses may be compelled to appear and testify in the same manner and by the same process and

proceedings as may be employed for the purpose of taking testimony in proceedings pending in this state. The district court for the county where the deponent is found may make such orders as could be made if the deposition were intended for use in this jurisdiction, having due regard for the laws and rules of such foreign jurisdiction.

COMMENT TO RULE 28

Subsection (a) follows former Neb. Rev. Stat. § 25-1267.14 (Repealed 1982), with the deletion of mayors and master commissioners as unnecessary. Subsection (b) does not follow former Nebraska statutes; the language of federal rule 28(a) was adopted to describe the officer by reference to the laws of the sister state or of the United States. Subsection (c) is new language on depositions in foreign countries and is taken from federal rule 28(b) which sets out all possible ways of taking depositions outside the United States. Subsection (d) follows the language of Neb. Rev. Stat. § 25-1267.17 (Repealed 1982), by applying the disqualification rule to both the officer and the person recording the testimony, if those are not the same person. Subsection (e) follows the language of former Neb. Rev. Stat. § 25-1267.18 (Repealed 1982), in establishing a procedure for taking a deposition in Nebraska for use in another state.

§ 6-329. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written or otherwise recorded stipulation:

(1) Provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(2) Modify the procedures provided by these rules for other methods of discovery.

COMMENT TO RULE 29

This provision is essentially new. It again authorizes the common practice of stipulations on discovery. It follows federal rule 29, but does not exclude certain subjects from stipulations as does the federal language. Similar language was originally included in former Neb. Rev. Stat. § 25-1267.19 (Repealed 1982), but had been dropped prior to the repeal of that section as the section had been amended several times to cover a different topic.

§ 6-330. Depositions upon oral examination.

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of summons, except that leave is not required:

(1) If a defendant has served a notice of taking a deposition or otherwise sought discovery, or

(2) If special notice is given as provided in subdivision (b)(2) of this rule.

The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization.

(1)(A) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(B) When the party against whom the deposition is to be used is unknown or is one whose whereabouts cannot be ascertained he or she may be notified of the taking of the deposition by publication. The publication must be made once in some newspaper printed in the county where the action is pending, if there be any printed in such county, and if not, in some newspaper printed in this state of general circulation in that county. The publication must contain all that is required in a written notice and must be made at least ten days prior to the deposition. Publication may be proved in the manner prescribed in Neb. Rev. Stat. § 25-520. A copy of the written notice shall be filed with the clerk before publication.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice:

(A) States that the person to be examined is about to go out of the State of Nebraska and will be unavailable for examination in the State of Nebraska unless his or her deposition is taken before expiration of the thirty-day period, and

(B) Sets forth facts to support the statement.

The plaintiff's attorney shall sign the notice, and his or her signature constitutes a certification by him or her that to the best of his or her knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he or she was served with notice under subdivision (b)(2) he or she was unable through the exercise of diligence to obtain counsel to represent him or her at the taking of the deposition the deposition may not be used against him or her.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The notice required by subdivision (1) shall state the manner in which the testimony will be recorded and preserved. The court may make any order necessary to assure that the record of the testimony will be accurate and trustworthy.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his or her notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone. For the purposes of theses rules a deposition taken by telephone is taken in the district and at the place where the deponent is to appear to answer questions.

(8)(A) A party taking a deposition may have the testimony recorded by videotape. The notice of deposition shall specify that a videotape deposition is to be taken.

(B) Upon the request of any of the parties, the officer before whom a videotape deposition is taken shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.

(C) When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be recorded on the videotape with a statement by the witness on such tape of the reasons given by him or her for making such changes.

(D) The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certificate that the witness was duly sworn or affirmed by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Nebraska Evidence Rules. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. The testimony shall be recorded in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he or she shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the district court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification; Delivery; Storage.

(1) The officer shall certify on the deposition that the witness was truly sworn by him or her and that the deposition is a true record of the testimony of the witness. Unless otherwise ordered by the court, he or she shall then deliver the deposition to the party taking the deposition, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, he or she may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he or she affords to all parties fair opportunity to verify the copies by comparison with the originals or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the originals be annexed to the deposition, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him or her and his or her attorney in attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him or her and the witness because of such failure does not attend, and if another party attends in person or by attorney because he or she expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him or her and his or her attorney in attending, including reasonable attorney fees.

COMMENTS TO RULE 30

30(a) This subsection is substantially the same as the federal rule. It is also similar to former Neb. Rev. Stat. § 25-1267.01 (Repealed 1982). Changes from the earlier statute include the addition of the special notice defined in subdivision (b)(2) and the plaintiff's waiting time is expanded from 20 to 30 days.

30(b) This section is based on former Neb. Rev. Stat. §§ 25-1267.19 to 25-1267.21 (Repealed 1982). Subdivision (1)(A) eliminates the particular requirements of time contained in the former sections as unnecessary. It is similar to the present federal rule 30(b)(1). Subdivision (1)(B) follows the language of current law allowing published notice of the taking of a deposition.

Subdivision (2) has been adapted from the federal rule. Subdivision (4) follows the language of former Neb. Rev. Stat. § 25-1267.19 (Amended 1979) (Repealed 1982). Subdivision (6) is a new provision that was added to the federal rules in 1970 that is very useful when taking a deposition of a corporation or organization.

Subdivision (7) is based on a similar provision adopted in the federal rules in 1980. Subdivision (8) is adapted from former Neb. Rev. Stat. § 25-1267.45 (Repealed 1982); it has been shortened substantially because some of the subjects currently covered by the statute are either covered elsewhere in the rules or are better left to the control of the trial judge.

30(c) The language of this subsection is substantially the same as the federal rule and former Neb. Rev. Stat. §§ 25-1267.03 and 25-1267.23 (Repealed 1982). The requirement in former § 25-1267.23 that the testimony be taken stenographically has been dropped in accordance with the 1979 amendment of former Neb. Rev. Stat. § 25-1267.19 (Repealed 1982).

30(d) This is substantially the same as the federal rule and former Neb. Rev. Stat. § 25-1267.24 (Repealed 1982).

30(e) This is substantially similar to the federal rule and former Neb. Rev. Stat. § 25-1267.25 (Repealed 1982), except that subsection (2) of that section has been dropped as unnecessary because a court order is not required to take the testimony by nonstenographic means.

30(f) The former Nebraska statute was Neb. Rev. Stat. § 25-1267.26 (Repealed 1982). Additional language from the federal rule provides a procedure for handling documents and things produced during a deposition . The deposition will not be filed with the court but will be sent to the party taking the deposition. Subsection (f)(3) requires notice to other parties that the deposition has been received; Rule 26(g) provides that a certificate of completion will not be filed with the court. The party taking the deposition will have to preserve the original in order to be able to file it when required to do so under Rule 26(g).

30(g) The language of this subsection follows former Neb. Rev. Stat. § 25-1267.27 (Repealed 1982), with the addition of a specific mention of attorney fees.

Rule 30(f)(1) amended December 12, 2001; comments to Rule 30(f) amended December 12, 2001. Renumbered and codified as § 6-330, effective July 18, 2008.

§ 6-331. Depositions upon written questions.

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person including a party by deposition upon written questions. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may, for cause shown, enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver the deposition, attaching thereto the copy of the notice and the questions received by him or her.

(c) The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

COMMENT TO RULE 31

This rule substantially follows the federal rule and former Neb. Rev. Stat. §§ 25-1267.28 to 25-1267.30 (Repealed 1982). The time periods for serving questions are longer than under former Nebraska law.

§ 6-332. Use of depositions in court proceedings.

(a) Use of Depositions. Any part or all of a deposition, so far as admissible under the Nebraska Evidence Rules applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Nebraska Evidence Rules.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) That the witness is dead; or

(B) That the witness is at a greater distance than one hundred miles from the place of trial or hearing, or out of the state, or beyond the subpoena power of the court, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) Upon application and notice prior to the taking of the deposition, that circumstances exist such as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him or her to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts relevant to the issues.

Substitution of parties does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Nebraska Evidence Rules.

(b) Objections to Admissibility. Subject to the provisions of subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying; or if the trial court directs, such objections may be heard and determined prior to trial.

(c) (Not Used).

(d) Effect of Errors and Irregularities in Deposition.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency or relevancy of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. In a deposition recorded and preserved by nonstenographic means, such objections shall be made to the court before the trial or hearing, or such objections will be waived unless otherwise ordered by the court.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the depositions.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ten days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or recorded, or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

COMMENTS TO RULE 32

32(a) This section is based upon former Neb. Rev. Stat. § 25-1267.04 (Repealed 1982). Under subsection (3)(B) the witness must be at least 100 miles away in order to use the deposition in district court because Neb. Rev. Stat. § 25-1227 establishes 100 miles as the maximum distance a witness must ordinarily travel for a civil trial in district court. For county or municipal court the subpoena power is limited to the county, so a deposition could be used for a witness outside the county but within 100 miles. Subdivision (3)(E) allows use of a deposition under exceptional circumstances; under subdivision (3)(F) the court may authorize use of the deposition in the absence of exceptional circumstances if the application is made before the deposition is taken. This is a further expansion of the idea in former § 25-1267.04(3)(f), but it is no longer restricted to audio-visual or videotape.

32(b) No substantial change from the federal rules or former Neb. Rev. Stat. §§ 25-1267.05 and 25-1267.36 (Repealed 1982).

32(c) Not used because the topic is covered by the Nebraska Evidence Rules.

32(d) No substantial change from the federal rules or former Neb. Rev. Stat. §§ 25-1267.32 and 25-1267.35 (Repealed 1982).

§ 6-333. Interrogatories to parties.

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. Unless otherwise permitted by the court for good cause shown, no party shall serve upon any other party more than fifty interrogatories. Each question, subquestion, or subpart shall count as one interrogatory.

Each interrogatory shall be repeated and answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Nebraska Evidence Rules.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

COMMENTS TO RULE 33

33(a) This subsection differs from the federal rules and former Neb. Rev. Stat. §§ 25-1267.37 and 25-1267.38 (Repealed 1982) by imposing a limit of 50 interrogatories upon any party, unless the court permits more for good cause shown. Because interrogatories are particularly subject to being abused or improperly used, this discovery device has been limited unless a party can show that the complexity of the case requires the use of additional interrogatories.

33(b) This subsection expands former Neb. Rev. Stat. § 25-1267.38 (Repealed 1982) and follows the federal rules by allowing interrogatories that involve opinions. This follows the federal rule by eliminating an unnecessary restriction on interrogatories. The overall limit on interrogatories and consequent elimination of extensive sets of interrogatories should minimize any chance for abuse.

33(c) This follows the federal rule; it is a procedure for handling discovery from voluminous records that is necessary for certain large cases. No Nebraska statutory section served as precedent for this subsection of the rules.

Rule 33(c) amended June 4, 2008, effective June 18, 2008. Renumbered and codified as § 6-333, effective July 18, 2008.

§ 6-334. Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes.

(a) Scope. Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his or her behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained) translated, if necessary, by the respondent into reasonably usable form, or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMENT TO RULE 34

This rule follows the federal rule and changes former Nebraska law, Neb. Rev. Stat. § 25-1267.39 (Repealed 1982), by allowing production by notice instead of by court order. Many such examinations can be handled without need of a motion and order, so the proposal eliminates unnecessary steps. Rule 37 still allows a party to seek an order if that step is necessary.

Rule 34(a)(1) and 34(b)(1-3) amended June 4, 2008, effective July 18, 2008. Renumbered and codified as § 6-334, effective July 18, 2008.

§ 6-334(A). Discovery from a nonparty without a deposition.

(a) Procedure.

(1) Scope. Any party may, by subpoena without a deposition:

(A) require the production for inspection, copying, testing, or sampling of designated books, papers, documents, tangible things, or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained) translated if necessary by the owner or custodian into reasonably usable form, that are in the possession, custody, or control of a person who is not a party and within the scope of Rule 26(b); or

(B) obtain entry upon designated land or other property within the scope of Rule 26(b) that is in the possession or control of a person who is not a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) Notice. A party intending to serve a subpoena pursuant to this rule shall give notice in writing to every other party to the action at least 10 days before the subpoena will be issued. The notice shall state the name and address of the person who will be subpoenaed, the time and place for production or entry, and that the subpoena will be issued on or after a stated date. A designation of the materials sought to be produced shall be attached to or included in the notice.

Such notice may be given by a party other than a plaintiff at any time. Such notice may not be given by a plaintiff until the time at which Rule 30(a) would permit a plaintiff to take a deposition.

(3) Issuance. A subpoena may be issued pursuant to this rule, either by a request to the clerk of the court or by an attorney authorized to do so by statute, at any time after all parties have been given the notice required by subsection (2). The subpoena shall identify all parties who were given notice that it would be issued and the date upon which each of them was given notice. A subpoena pursuant to this rule shall include or be accompanied by a copy of this rule.

(4) Time, manner, and return of service. A subpoena pursuant to this rule shall be served either personally by any person not interested in the action or by registered or certified mail not less than 10 days before the time specified for compliance. The person making personal service shall make a return showing the manner of service to the party for whom the subpoena was issued.

(b) Protection of Other Parties.

(1) Objection Before Issued. Before the subpoena is requested or issued any party may serve a written objection on the party who gave notice that it would be issued. The objection shall specifically identify any intended production or entry that is protected by an applicable privilege, that is not within the scope of

discovery, or that would be unreasonably intrusive or oppressive to the party. No subpoena shall demand production of any material or entry upon any premises identified in the objection. If the objection specifically objects that the person served with the subpoena should not have the option to deliver or mail copies of documents or things directly to a party, the subpoena shall not be issued unless all parties to the lawsuit mutually agree on the method for delivery of the copies.

(2) Order. The party who gave notice that a subpoena would be issued may apply to the court in which the action is pending for an order with respect to any discovery for which another party has served a written objection. Upon hearing after notice to all parties the court may order that the subpoena be issued or not issued or that discovery proceed in a different manner, may enter any protective order authorized by Rule 26(c), and may award expenses as authorized by Rule 37(a)(4).

(3) Protective Order. After a subpoena has been issued any party may move for a protective order under Rule 26(c).

(c) Protection of the Person Served with a Subpoena.

(1) Avoiding Burden and Expense. A party or an attorney who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court by which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings of the person subject to the subpoena and reasonable attorney fees.

(2) Responding to the Subpoena.

(A) A person served with a subpoena pursuant to this rule shall permit inspection, copying, testing, or sampling either where the documents or tangible things are regularly kept or at some other reasonable place designated by that person. If the subpoena states that the person served has an option to deliver or mail legible copies of documents or things instead of inspection, that person may condition the preparation of the copies on the advance payment of the reasonable cost of copying.

(B) A person served with a subpoena pursuant to this rule may, within 10 days after service of the subpoena, serve upon the party for whom the subpoena was issued a written objection to production of any or all of the designated materials or entry upon the premises. If objection is made, the party for whom the subpoena was issued shall not be entitled to production of the materials or entry upon premises except pursuant to an order of the court. If an objection has been made, the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena. Such an order to compel production or to permit entry shall protect any person who is not a party or an officer of a party from significant expense resulting from complying with the command.

(3) Protections. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(A) fails to allow reasonable time for compliance,

(B) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(C) subjects a person to undue burden.

(d) Duties in Responding to Subpoena.

(1) Production. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Objection. When information subject to a subpoena is withheld on an objection that it is privileged, not within the scope of discovery, or otherwise protected from discovery, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the party who requested the subpoena to contest the objection.

(e) Coordination.

(1) Copies. If the party for whom the subpoena was issued creates or obtains copies of documents or things, that party shall make available a duplicate of such copies at the request of any other party upon advance payment of the reasonable cost of making the copies.

(2) Inspection. If a notice of intent to serve a subpoena designates that the subpoena will require entry upon land or other property for the purposes permitted by subsection (a)(1)(B), any other party shall, upon request to the party who gave the notice, be named in the subpoena as also attending at the same time and place.

COMMENT TO RULE 34A

Authority to issue a subpoena pursuant to this rule is governed by Neb. Rev. Stat. § 25-1273. The procedure is similar to the practice for nonparty nondeposition discovery under Fed. R. Civ. P. 45, with certain topics such as the time of prior notice and coordination of the disclosure more specifically defined. This procedure is optional, so a party may elect to use a deposition or any other available discovery procedure instead.

Rule 34A and Comment adopted December 12, 2001; Rule 34A(c)(2)(B) amended May 19, 2004; Rule 34A(a)(1)(A), 34A(a)(2), 34A(b)(1), 34A(c)(2)(A-B) amended June 4, 2008, effective June 18, 2008. Renumbered and codified as § 6-334(A), effective July 18, 2008.

§ 6-335. Physical and mental examination of persons.

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by one or more physicians, or other persons licensed or certified under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him or her a copy of a detailed written report of the examining physician setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he or she is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are

just, and if a physician fails or refuses to make a report, the court may exclude his or her testimony if offered at the trial.

(2) (Not used).

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

COMMENTS TO RULE 35

35(a) This rule follows the federal rule and expands former Neb. Rev. Stat. § 25-1267.40 (Repealed 1982). A person under the control of a party is now included in this rule. The court may order more than one examination. The health professions that require a license or certificate are defined in Neb. Rev. Stat. § 71-102.

35(b) This section follows the federal rules and establishes a useful procedure for exchange of medical reports. Subdivision (b)(2) of the federal rule is not used because the Nebraska Evidence Rules contain a direct waiver of the privilege. See Neb. Rev. Stat. § 27-504.

Rule 35(b) comment amended February 26, 1997; Rule 35(a) and 35(a) comment amended November 21, 2001. Renumbered and codified as § 6-335, effective July 18, 2008.

§ 6-336. Requests for admission.

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each matter of which an admission is requested shall be separately set forth by the party making the request, and shall be repeated by the responding party in the answer or objection thereto. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him or her. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, he or she shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he or she states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he or she may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he or she cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If

the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him or her for any other purpose nor may it be used against him or her in any other proceeding.

COMMENTS TO RULE 36

36(a) This section follows the federal rule and adds to former Neb. Rev. Stat. § 25-1267.41 (Repealed 1982) by providing a procedure for determining the sufficiency of answers or objections.

36(b) This section follows the federal rule, and includes language controlling the effect and withdrawal of admissions. The former law was Neb. Rev. Stat. § 25-1267.42 (Repealed 1982).

§ 6-337. Failure to make discovery: sanctions.

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or alternatively, on matters relating to a deposition, to the district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the district court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him or her to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or her, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may, within 30 days of so proving, apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(1) The request was held objectionable pursuant to Rule 36(a), or

(2) The admission sought was of no substantial importance, or

(3) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) There was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails

(1) To appear before the officer who is to take his or her deposition, after being served with a proper notice, or

(2) To serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or

(3) To serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or her or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

COMMENTS TO RULE 37

37(a) This section follows the federal rule and changes former Nebraska law by including requests to produce as proper for a motion to compel discovery. The language on imposition of expenses for unjustified discovery demands or unjustified refusals to comply with discovery has been changed from former Nebraska law to reduce judicial reluctance to impose sanctions. The former Nebraska section was Neb. Rev. Stat. § 25-1267.43 (Repealed 1982).

37(b) This section follows the federal rule and former Nebraska law, and adds to former law an explicit statement that a failure to obey an order may be punished as a contempt of the court. The former Nebraska statute was Neb. Rev. Stat. § 25-1267.44 (Repealed 1982).

37(c) This section follows the federal rule and changes the former Nebraska law to make it clear that expenses include attorney fees and to more fully define the conditions under which costs shall not be imposed. The former Nebraska section Neb. Rev. Stat. § 25-1267.44(3) (Repealed 1982).

37(d) This section follows both the federal rule and former Nebraska law, adding a provision allowing sanctions for failure to respond to a demand to produce under Rule 34 because that procedure now operates without an initial court order. The former Nebraska statute was Neb. Rev. Stat. § 25-1267.44(4) (Repealed 1982).

Rule 37(c) amended July 23, 1997. Renumbered and codified as § 6-337, effective July 18, 2008.